In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF MARGUERITE K. BOYCE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, but only if the Court grants the petition for certiorari in No. 73-1614.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. App. 32a-36a)[1] are unofficially reported at P-H Memo T.C. par. 72,204. The opinion of the court of appeals (Pet. App. 1a-12a) is not yet officially reported. It is unofficially reported at 33 A.F.T.R. 2d 813.

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[1]"Pet. App." references are to the appendix to the petition in *Wolder* v. *Commissioner*, No. 73-1614.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on February 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an estate is entitled to an estate tax deduction, as a claim against the estate under Section 2053(a)(3) of the Internal Revenue Code of 1954, for the fair market value of certain stock transferred under the decedent's will to her attorney pursuant to a contract in which the attorney promised to furnish legal services to the decedent in exchange for her promise to leave him the stock.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2053. EXPENSES, INDEBTEDNESS, AND TAXES.

(a) *General Rule.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts—

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(3) for claims against the estate * * *

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as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

* * * * *

(c) *Limitations.*—

(1) *Limitations applicable to subsections (a) and (b).* —

(A) Consideration for claims.—The deduction allowed by this section in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth; except that in any case in which any such claim is founded on a promise or agreement of the decedent to make a contribution or gift to or for the use of any donee described in section 2055 for the purposes specified therein, the deduction for such claims shall not be so limited, but shall be limited to the extent that it would be allowable as a deduction under section 2055 if such promise or agreement constituted a bequest.

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STATEMENT

Pursuant to an agreement entered into in 1947, Victor R. Wolder, a lawyer, agreed to render such legal services for Marguerite K. Boyce as she might personally require during her lifetime and not to bill her for such services. In turn, Mrs. Boyce agreed to bequeath to Wolder certain shares of stock (Pet. App. 4a). Both the Tax Court (Pet. App. 14a-21a) and the court of appeals (Pet. App. 1a-12a) held in *Wolder* v. *Commissioner* that the fair market value of the shares and an amount of cash[2] bequeathed to Wolder was includible in Wolder's gross income under Section 61(a) of the Code, and was not exempt as a gift under Section 102.

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[2]The cash bequest was made because the shares originally specified in the will were exchanged for common and convertible preferred shares of another corporation as a result of a merger. The convertible preferred shares were redeemed for $15,845, the amount of the cash bequest (Pet. App. 4a).

In this case, the Commissioner contended the stock and cash were not deductible for estate tax purposes as a claim against the estate under Section 2053(a)(3) of the Code if they were tax-free bequests to Wolder, but conceded that if they were taxable to Wolder, the estate was entitled to a deduction for them. Since both courts below held that the value of the stock and cash was income to Wolder,[3] they held in this case that the estate was entitled to the claimed deduction under Section 2053(a)(3) (Pet. App. 32a-36a, 4a n. 2, 11a).

REASON FOR GRANTING THE WRIT

There is presently pending a petition for a writ of certiorari (No. 73-1614) challenging the decision of the court of appeals in *Wolder* v. *Commissioner*, that the value of the stock and cash are taxable to Wolder in 1966. The Commissioner intends to oppose this petition. Should the Court grant that petition, however, it should also grant the present petition. This is necessary to preserve the Commissioner's alternative position, taken to protect the revenue, that in the event the cash and stock is deemed to be a tax-free bequest, the estate is not entitled to a deduction for a claim for estate tax purposes.

CONCLUSION

The petition for a writ of certiorari should be granted, but only if the Court grants the petition in No. 73-1614.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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[3]The court of appeals reversed the decision of the Tax Court with respect to the proper year in which the value of the stock was includible in income. It held the proper year was 1966 (Pet. App. 9a-11a).

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